cited dictum of Lord Hodson in *Secretary of State for Defence* v. *Warn,*[7] referred to with approval by Abdoolcader F.J. (as he then was) in *Mersing Omnibus* v. *Minister of Labour,*[8] that "procedural sections are usually mandatory and there is nothing which points to the contrary in this case."

In the *Mersing* case, the High Court had granted leave to commence certiorari proceedings even though the application for leave was made out of time and no extension of time sought or the delay accounted for to its satisfaction. It was held, on appeal, that leave should not have been granted and that the High Court had no jurisdiction to do so. This decision is, of course, wholly in accord with the principle that regulations governing the practice and procedure of civil courts which go to the jurisdiction – and a requirement for leave is such a matter – are in the general interest and cannot be waived (see *e.g. Soho Square Syndicate Ltd.* v. *E. Pollard & Co. Ltd.;*[9] *Bowmaker Ltd.* v. *Tabor*[10]).

In the present case, unlike the *Mersing* case, not only had the applicants obtained leave but had also entered their substantive applications for certiorari within the periods limited under the rules, their only defaults – if defaults there were – being limited to the service of the applications and the filing of the affidavit of service within the periods contended for the respondent. The *Mersing* case was, therefore, clearly distinguishable.

When one considers that the object of the requirements as to service is to put the respondent on notice at the earliest opportunity so that he does not take any further step to the prejudice of either or both parties, the objection loses most, if not all, its sting. I have already pointed out that counsel for the respondent was in fact present when the application for leave was heard before Harun J. and must therefore be assumed to have had notice of the intended substantive application for certiorari and of the grounds therefor. As I have said, there could therefore have been no question of the respondent having suffered any prejudice nor indeed could it even have alleged any.

Moreover, counsel for the applicants had accounted for the delay in effecting service to my satisfaction. It was for these reasons that, assuming, contrary to my primary opinion, service of the applications and filing of the affidavit of service had been effected out of time, so far as may have been necessary, I condoned the defaults and by way of alternative, I made the required orders for extension of time by virtue of the powers conferred upon me by Order 2 rule 1(1) and Order 3 rule 5(1) and (2) respectively.

Finally, I saw no reason why costs of the preliminary objection should not follow the event; that is to say that they had to be paid by the respondent to the applicants, in any event, and I so ordered.

Order accordingly.

Solicitors: *Zain & Co.; Presgrave & Matthews.*

SINJO CREDIT & LEASING SDN. BHD. v. MINISTER OF FINANCE, MALAYSIA

[O.C.J. (Shankar J.) October 11, 1986]

[Johore Bahru – Originating Motion No. 32-16 of 1986]

Administrative Law – Certiorari – Order of – Application for – Forfeiture of car – Appeal to Minister rejected – Discretionary power of Minister – No reasons given – whether decision of Minister ought to be quashed.

The applicant is in the business of selling cars on hire purchase. On May 6, 1985 it entered into a hire purchase agreement with one Nasrul bin Machmuddin with respect to a car No. JBB 2833 ("the car"). On May 13, 1985, acting on information received, some customs officers apprehended this car at Pontian. The driver of the car escaped. When the car was searched, it was found to contain contraband in the form of a substantial quantity of textiles on which duty had not been paid.

On May 7, 1986 an inquiry was held in the Magistrate's Court, Johore Bahru. The customs officers gave evidence. The contraband articles were produced. There was overwhelming evidence that the car had been used in the commission of a customs offence.

The learned magistrate made an order under section 127 of the Customs Act 1967, *i.e.* that the car be forfeited. On May 16, 1986 the applicant appealed to the Minister of Finance for the release of the car to them. It submitted that the hirer had run away, that his whereabouts were unknown and that it would not therefore be possible for the applicant to recover their loss from the hirer. Furthermore, it urged that the court had not found that the applicant was in any way involved in the commission of the offence. The appeal to the Minister was rejected.

The applicant made the present application for leave to apply for an order of certiorari to remove into this court for the purpose of it being quashed, the decision of the Minister of Finance on the appeal made by the applicant.

Held: (1) leave is not granted in such applications as a matter of course; credible grounds must be advanced to show that there is a case to argue. The mere fact that the owner of a vehicle was innocent of the offence for the commission of which the vehicle was used does not entitle him as a matter of right to have an order from the Minister for the return of his vehicle to him;

(2) the deciding authority in this case was the Minister and not the court and the section did not impose upon him any duty to give reasons for his decision. He must of course consider all the material placed before him and decide in good faith;

(3) the application was dismissed.

Cases referred to:

(1) *Ridge* v. *Baldwin* [1964] A.C. 40.
(2) *Soong Chee Kong* v. *Public Prosecutor* [1951] M.L.J. 5.
(3) *Reg.* v. *Ng Hee Weng & Ors.* [1956] M.L.J. 85.
(4) *Public Prosecutor* v. *Wong Kong Yoong* [1964] M.L.J. 63.
(5) *Ting Seh Hing* v. *Public Prosecutor* [1985] 1 M.L.J. 463.
(6) *Padfield* v. *Minister of Agriculture* [1968] 1 All E.R. 694.

ORIGINATING MOTION.

T. Balaskanda for the applicant.

Sallehudin bin Haji Mohamed Lip (Federal Counsel) for the respondent.

Cur. Adv. Vult.

Shankar J.: This is an application for leave to apply for an order of certiorari to remove into this court for the purpose of its being quashed, the order made by the Minister of Finance dated July 28, 1985 when the applicant's appeal under section 129 of the Customs Act 1967 for the return of the applicant's motor vehicle JBB 2833 was rejected by the respondent.

The applicant is in the business of selling cars on hire purchase. On May 6, 1985 it entered into a hire purchase agreement with one Nasrul bin Machmuddin with respect to car No. JBB 2833 ("the car"). The hire purchase agreement provided for a deposit to be paid of $2,700 and 24 monthly instalments thereafter of $350 each.

On May 13, 1985, acting on information received, some customs officers apprehended this car at Pontian. The driver of the car escaped. When the car was searched, it was found to contain contraband in the form of a substantial quantity of textiles on which duty had not been paid.

On May 7, 1986 an inquiry was held in the Magistrate's Court, Johore Bahru. The customs officers concerned gave evidence. The contraband articles were produced. There was overwhelming evidence that the car had been used in the commission of a customs offence.

The applicant company participated in the inquiry. A clerk of theirs gave evidence that shortly after the hire purchase agreement was signed, the cheque issued by the hirer had bounced, and their attempts to locate him or the car were abortive. Subsequently, they came to know that the car had been impounded by the customs. The hirer himself did not appear at the inquiry.

In these circumstances, the learned magistrate made the only order he could under section 127 of the Customs Act 1967 which reads in material particulars:

> "An order for the forfeiture... of anything liable to forfeiture under this Act shall be made by the court... if it is proved to the satisfaction of the court that an offence against this Act ... has been committed and that the goods ... were used in the commission of the offence notwithstanding that no person may have been convicted of such offence."

On May 16, 1986 the applicant through its solicitors appealed to the Minister of Finance ("the Minister") for the release of the car to them. They attached a copy of the notes of the inquiry to their appeal. They claimed that the forfeiture would result in a loss of $10,000 to the applicant. They submitted that the hirer had run away, that his whereabouts were unknown, and that it would not therefore be possible for the applicant to recover their loss from the hirer. Furthermore, they urged that the court had not found that the applicant was in any way involved in the commission of the offence apart from being the owners of the car in question. By a letter dated July 28, 1986, the Minister through his relevant officer referred to the solicitor's letter and stated that the Minister did not agree to return the car to the applicant. In other words, the appeal was rejected. So this application was filed.

The only ground urged by Federal Counsel in opposing the application was that the decision of the Minister was an administrative act and therefore not subject to judicial review. With respect, the distinction between judicial and administrative activities was swept away by the decision of the House of Lords in *Ridge* v. *Baldwin*[1] and I would agree that judicial review now lies against any person or body of persons charged with any public duty. However, contrary to what has been urged by the applicant, I do not agree that leave should be automatically granted in all cases.

The application was supported by an affidavit of the managing director of the applicant, one Mr. Tan Toh Um ("Mr. Tan").

This Mr. Tan says that he believes that the Minister rejected the appeal solely because the applicant was a car finance and credit company and that it was the Minister's policy to reject all appeals from finance and other car credit companies. The sources and the materials for this belief were not disclosed, and in their absence, I am compelled to infer that this allegation is baseless.

The other grounds urged, and the court's response to them, are as follows:

(1) That the Minister had acted contrary to the rules of natural justice. As against this the applicant through his solicitor had the fullest opportunity of presenting their case, and they did so by the letter aforesaid to which they attached the notes of evidence of the inquiry.

(2) That the Minister had acted in excess of his jurisdiction. In the face of section 129 of the Act, such a suggestion is misconceived.

(3) That the Minister erred in law and that there are errors in law "on the fact of the record" (*sic*) in that the Minister's finding was contrary to the finding of the court that the applicants were an innocent party. But the "record" in this case was the Minister's letter of the rejection of the appeal. There was no error of law on the face of that document.

Four other grounds have been urged, which are all a repetition of the same ground *i.e.* that there were errors of law and fact on the record, that the rules of natural justice had not been obeyed, that the Minister had acted not upon a consideration of the facts of the case but blindly in pursuance of a policy to reject all appeals from finance companies, and that he had given no reason for the rejection of the appeal.

This is not the first time that such a problem has arisen in our courts. See *Customs Offences* 1st Ed. by Dr. Andrew Chew Peng Hui at p. 254 where he refers to *Soong Chee Kong* v. *Public Prosecutor*,[2] *Reg.* v. *Ng Hee Weng & Ors.*,[3] and *Public Prosecutor* v. *Wong Kong Yoong*.[4] *Ting Seh Hing* v. *Public Prosecutor*[6] is another recent case.

Leave is not granted in such applications as a matter of course. Credible grounds must be advanced to show that there is a case to argue. The mere fact that the owner of a vehicle was innocent of the offence for the commission of which the vehicle was used does not entitle him as a matter of right to have an order from the Minister for the return of his vehicle to him.

Some days after the court rose, the applicant submitted a further list of authorities by which time my judgment had already been prepared. For the sake of completion, these authorities have been listed hereunder. They have not caused any change in my thinking. One of the cases, *Padfield* v. *Minister of Agriculture*,[6] was nevertheless of some interest. It was there held that although the English Minister of Agriculture had an unfettered discretion under the Agricultural Marketing Act 1958, he was bound to exercise it lawfully, *viz.*, not to misdirect himself in law, nor to take into account irrelevant matters, nor to omit relevant matters from considation. But in that case, the Minister gave his reasons, and they were wrong reasons. Furthermore, the complaint in that case was a substantial and genuine complaint. It was not frivolous, repetitive or vexatious.

The court there held that the fact that a Minister gave no reasons for his decision whether or not to exercise a discretionary power conferred on him by statute would not prevent the court from reaching a conclusion in a proper case that a prerogative order should issue.

At the risk of repetition, let me say once again that I do not consider this case a proper one for judicial intervention. Mere innocent ownership, in the view of this court, is only one of the factors that goes into the equation. Standing alone, it should never be enough. Apart from making the down-payment, it appears from the notes of evidence of the inquiry, which the Minister had before him, that the hirer was thoroughly unreliable. The inference is open that the hire purchase company did not take adequate steps to investigate the *bona fides* of the person to whom they were providing the car. At the inquiry, the hirer was not called. There was no evidence from which it could be positively concluded that he was the one who was driving the car at the time the offence was committed. But then there was no evidence that he had not provided the car for the use to which it was put. The act of smuggling in this case was wanton and deliberate. On the material available, if this court had to decide the matter, I would have upheld the order of forfeiture.

But it cannot be more strongly emphasized that the deciding authority in this case is the Minister and not the court, and the section does not impose upon him any duty to give reasons for his decision. He must of course consider all the material placed before him and decide in good faith. Where the evidence is that the offence was committed and that the car was used in the commission of the offence, as in this case, the forfeiture order is mandatory. That fact should speak for itself. The Minister is not a court of appeal. The materials before me do not suggest that he acted improperly in any way.

This application is therefore dismissed with costs.

Application dismissed.

Solicitors: *Zaman & Associates.*

RE S. NIRMALA a/p MUTHIAH SELVARAJAH t/a SHAMIN PROPERTIES; *EX PARTE* THE NEW STRAITS TIMES PRESS (MALAYSIA) BHD.

[A.C.J. (V.C. George J.) September 26, 1986]

[Kuala Lumpur – Bankruptcy No. 43-2964-85]

Bankruptcy – Bankruptcy notice – Order for substituted service – Application for – Practice Note No. 1 of 1968 – Whether Practice Note No. 1 applies.

Civil Procedure – Substituted service – Whether Practice Note No. 1 of 1968 applicable.

In the present case, the Senior Assistant Registrar refused to make an order for substituted service of a bankruptcy notice on the grounds that the requirements of Practice Note No. 1 of 1968 had not been met with.

The question in this appeal from the Senior Assistant Registrar's decision was whether the Practice Note No. 1 was applicable to the present case where the whereabouts of the person to be served was unknown.

Held, allowing the appeal: the Practice Note No. 1 of 1968 had no application in this case.

Cases referred to:

(1) *Deverall* v. *Grant Advertising* [1955] Ch. 111.
(2) *Porter* v. *Freudenberg* [1915] 1 K.B. 857.

APPEAL FROM REGISTRAR'S DECISION.

S. Sothi for the appellant.

Cur. Adv. Vult.

V.C. George J.: The question that arose in this appeal from the Senior Assistant Registrar's refusal to make an order for substituted service of a bankruptcy notice on the grounds that the requirements of Practice Note No. 1 of 1968 had not been met was the extent of the applicability of the Practice Note with particular reference as to whether the requirements of the Practice Note had to be adhered to before an application for substituted service could be made where the whereabouts of the person to be served was unknown.

Order 62 rule 5 of the Rules of the High Court 1980 deals with substituted service of process and sub-rule (1) thereto provides that the court may make an order for substituted service of a document "if it appears to the court that it is impracticable for any reason to serve that document personally".

In England, the provisions for substituted service are similar to ours and it was in connection with the need to satisfy the court that it was impracticable to serve the document that the learned authors of the *Supreme Court Practice* had recommended certain guidelines for practitioners, which guidelines can be found at p. 88 of the *1957 White Book.* Practice Note No. 1 of 1968 is a reproduction of those very guidelines. The basis for the guidelines (and for the Practice Note) is that a mere statement that the person to be served was evading service was not sufficient to meet the requirement of satisfying the court that it was impracticable to serve the document. The last paragraph of the Practice Note states that "compliance with the above practice will ensure that the application for substituted service will be grounded on other than a mere statement that the defendant is evading service. Such statement should never be sufficient to apply for an order for substituted service..." The phrase "compliance... will ensure" has the effect that the Practice Note does not prohibit other procedures that may bring about the same result.

Now, the Practice Note recommends certain steps to be taken before the application for substituted service is made.

Item 1 of the Note provides for two calls to be made. Item 2 is as follows:

"The calls should be made at the defendant's residence, permanent or temporary, if known; otherwise, or if the claim relates to the defendant's business, at his business address. If the defendant has left the address given on the writ, this should be stated in the affidavit. If a copy of the document to be served is left, it must be in a sealed envelope addressed to the defendant."